

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  IMPLEMENTATION OF THE FEDERAL COMMUNICATIONS COMMISSION'S TRIENNIAL REVIEW ORDER ADOPTING NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS	DOCKET NO. INU-03-1
--	---------------------

**ORDER GRANTING STAY OF PROCEEDINGS AND MOTION TO  
WITHDRAW UPDATED SGAT**

(Issued April 2, 2004)

**QWEST'S MOTION TO STAY**

**A. Introduction**

In an open meeting on February 20, 2003, the Federal Communications Commission (FCC) adopted rules concerning the obligations of incumbent local exchange carriers (ILECs) to make elements of their networks available on an unbundled basis. The FCC's written order was released on August 21, 2003, and published in the Federal Register on September 2, 2003, to be effective on October 3, 2003.<sup>1</sup>

**B. Qwest's motion to stay**

On March 5, 2004, Qwest Corporation (Qwest) filed a motion to stay the procedural schedule previously established by the Utilities Board (Board). This

---

<sup>1</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, "Report and Order on Remand and Further Notice of Proposed Rulemaking," FCC 03-36 (rel. Aug. 21, 2003) (Triennial Review Order or TRO).

motion was filed in response to the March 2, 2004, opinion of the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit or Court) in United States Telecom Assoc. v. FCC, Decision No. 00-1012.

In its opinion, the D.C. Circuit vacated the TRO. The Court found the FCC acted unlawfully when it delegated certain decision-making authority to state public utility commissions, including impairment determinations for mass market switching and certain dedicated transport elements. The Court also vacated and remanded the FCC's nationwide impairment determinations with respect to these elements. The Court temporarily stayed the vacatur until no later than (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from March 2, 2004, that is, to May 1, 2004. It is unclear at this point whether the FCC or any other party will file an appeal or petition with the United States Supreme Court and, if the Supreme Court does hear the appeal, whether it will stay the D.C. Circuit's decision.

Qwest suggests that no interest would be served by continuing these proceedings in Iowa in light of the Court's reversal of both the subdelegation issue and the national standard of impairment. Qwest notes that its case is based solely on the analysis set out in the TRO and that once appellate and remand proceedings are concluded, the TRO analysis may no longer apply or may be modified in ways that cannot be predicted with any certainty. Therefore, Qwest requests the Board indefinitely suspend the current proceedings in light of the appellate and remand proceedings and hold a status conference at a later date to re-evaluate the suspension after May 3, 2004 (the first business day after the 60-day temporary stay has elapsed).

**C. AT&T'S opposition**

On March 10, 2004, AT&T Communications of the Midwest, Inc., and TCG Omaha (collectively, AT&T) filed an opposition to Qwest's motion to stay, urging the Board to continue its investigation of the facts, which demonstrate that competitive local exchange companies (CLECs) have been unable to compete in Iowa's local exchange mass market without access to the unbundled network element platform (UNE-P). AT&T suggests that Qwest has a strong interest in diverting attention away from the facts showing that CLEC mass-market entry is impaired without UNE-P.

AT&T notes that the Qwest motion does not address the issue that the TRO remains in effect until May 1, 2004, and the rules and deadlines imposed by the FCC for completing the Board's nine-month proceeding also remain in place. AT&T maintains that even if the D.C. Circuit decision survives the expected challenges, it remains critical that the Board move forward with the Iowa-specific fact-finding role prescribed by the TRO. AT&T points out that the Court did not make any finding of non-impairment, nor did it direct the FCC to make any such finding. Instead, the Court's decision remands the matter to the FCC for re-examination of the issue.

In the alternative, AT&T recommends the Board move forward with its examination of the issues related to hot cuts regardless of its decision related to mass market switching. According to AT&T, the lack of economically viable, efficient, and scalable hot cut processes in Iowa continues to pose a serious barrier to the expansion of competition where CLECs use their own switching facilities.

**D. WorldCom's opposition**

On March 10, 2004, WorldCom, Inc. (MCI), filed a resistance to Qwest's motion to stay, arguing that the D.C. Circuit did not issue a mandate. MCI suggests that the Court voluntarily imposed a stay of its own decision, leaving the TRO and the delegation of authority to state commissions in effect for at least 60 days. MCI also notes that at least three FCC Commissioners have already announced, through public notices, plans to pursue a stay of the Court's decision and to file an appeal with the Supreme Court. MCI indicates that it plans to file an emergency stay request of the decision and to seek Supreme Court review on its own behalf.

MCI suggests the Board should move forward to identify and remove impairments to facilities-based residential competition by further developing the record in this proceeding so that only supplemental work would be necessary in the event the FCC requires new or additional information from the states.

**E. Qwest's response**

On March 15, 2004, Qwest responded to the filings made by MCI and AT&T. Qwest notes that the argument made by AT&T regarding any possible penalty for failure to meet the deadline for completing the nine-month proceeding is without merit, because Qwest, in its initial request for a stay of this proceeding, committed not to pursue its remedies if the deadline is missed due to the granting of a stay.

**F. Covad's concurrence**

On March 16, 2004, DIECA Communications, Inc., d/b/a Covad Communications Company, filed its concurrence in the pleadings filed by AT&T and MCI.

**G. Board analysis**

The Board's analysis begins with the D.C. Circuit's March 2, 2004, opinion, which makes the following concluding statement:

To summarize: We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). We also vacate and remand the Commission's nationwide impairment determinations with respect to these elements.<sup>2</sup>

Qwest's request for stay is based on the Court's decision to vacate both the FCC's subdelegation to states as well as the FCC's nationwide impairment determinations. In the absence of delegated authority and national standards to apply, prudence would dictate that these labor- and time-intensive proceedings should be delayed pending further direction from the courts or the FCC. When the Court's decision becomes effective, the resources applied up to that point will have been wasted. Qwest's motion for stay will be granted.

AT&T argues that the Board, at a minimum, should continue its examination of Qwest's batch hot cut procedures. (Iowa's proceeding was divided into a batch hot cut proceeding and an unbundled switching proceeding. Together, these two sets of issues comprise the mass market switching case as laid out in the TRO.) Indeed, the FCC's nationwide determination of impairment for unbundled switching is based primarily on the "economic and operational barriers caused by the cut over process."<sup>3</sup> Thus, states were delegated authority to develop a "batch cut migration process to be

---

<sup>2</sup> Slip opinion at p. 61.

<sup>3</sup> TRO at ¶ 459.

implemented by incumbent LECs that will address the costs and timeliness of the hot cut process” in order to cure switching impairment.<sup>4</sup>

However, as noted above, the D.C. Circuit vacated the “subdelegation to state commissions of decision-making authority over impairment determinations.” Both the batch hot cut proceeding and the unbundled switching proceeding were targeted towards the same overall goal – the determination and curing of impairment regarding Qwest’s provisioning of UNE-P in Iowa. Therefore, the subdelegation of authority to develop a batch cut migration process is being vacated and the Board’s batch hot cut proceeding should also be stayed.

#### **QWEST’S MOTION TO WITHDRAW**

On March 15, 2004, Qwest filed a motion to withdraw its “Notice of Updated Statement of Generally Available Terms and Conditions,” (SGAT) filed on February 18, 2004. The SGAT is a standard interconnection agreement offered to CLECs, developed and approved during Qwest’s Section 271 proceedings (Docket No. INU-00-2). Qwest filed its updated SGAT to reflect changes required by the TRO.

Qwest noted that if the D.C. Circuit’s decision is not stayed, certain sections of the updated SGAT will need to be revised. In the event the Court’s decision becomes effective, Qwest will file a new updated SGAT based on sections of the TRO that are undisturbed by the Court’s decision. Alternatively, if the D.C. Circuit’s decision is stayed, Qwest will resubmit the updated SGAT as filed on February 18,

---

<sup>4</sup> TRO at ¶ 488.

2004. The Board finds Qwest's proposal is reasonable and will grant the request to withdraw the updated SGAT filed on February 18, 2004.

### **ORDERING CLAUSES**

#### **IT IS THEREFORE ORDERED:**

1. The "Motion to Stay Procedural Schedule and Discovery" filed by Qwest Corporation on March 5, 2004, is granted.
2. On or before May 7, 2004, Qwest shall file a recommendation regarding the need for a continued stay in this proceeding.
3. The "Motion for Withdrawal of its Notice of Updated Statement of Generally Available Terms and Conditions" (SGAT) filed by Qwest Corporation on March 15, 2004, is granted.

### **UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 2<sup>nd</sup> day of April, 2004.